

EXHIBIT B-2

<p style="text-align: right;">Page 209</p> <p>1 experience.</p> <p>2 Q. Well, what would -- how about</p> <p>3 five?</p> <p>4 A. Again, I'd go through the same</p> <p>5 process, determine why there's five that you</p> <p>6 would have to put on.</p> <p>7 Q. No, I got that process. I'm</p> <p>8 talking about we reached that point.</p> <p>9 See, here's my question --</p> <p>10 A. Then I think --</p> <p>11 Q. -- it's a simple one.</p> <p>12 A. Well, do I get to answer or do</p> <p>13 I get interrupted again?</p> <p>14 Q. Oh, you'll get interrupted</p> <p>15 again if you keep giving the same answer,</p> <p>16 non-answer.</p> <p>17 A. I'm sorry, go ahead. You keep</p> <p>18 asking the same question over and over again.</p> <p>19 Q. You're right, I do. You keep</p> <p>20 answering the same question. Here's the</p> <p>21 problem, your answer isn't my question.</p> <p>22 A. It depends on the situation.</p> <p>23 I'd have to look at it and give you my</p> <p>24 opinion.</p>	<p style="text-align: right;">Page 211</p> <p>1 depending upon the situation would determine</p> <p>2 what type of tool I used to evaluate it.</p> <p>3 Q. Okay. And within the arsenal</p> <p>4 of tools, what would they be?</p> <p>5 A. Well, the usability study would</p> <p>6 be one of them. A heuristic evaluation would</p> <p>7 be one of them.</p> <p>8 Q. Okay. Anything else?</p> <p>9 A. You need to go through a litany</p> <p>10 of different tools that are available to a</p> <p>11 manufacturer or a consultant.</p> <p>12 Q. That is specific to that</p> <p>13 question?</p> <p>14 A. There's multiple different ways</p> <p>15 you can do it. You can perform hallway</p> <p>16 testing on it. You can perform focus group</p> <p>17 testing on it. There's different fidelities</p> <p>18 in your usability testing. So there's</p> <p>19 different ways to skin the cat. It depends on</p> <p>20 the situation.</p> <p>21 Q. You mentioned a few moments ago</p> <p>22 making a decision on whether an on-product</p> <p>23 warning is appropriate or not. Let's say</p> <p>24 necessary. Okay, you would evaluate whether</p>
<p style="text-align: right;">Page 210</p> <p>1 Q. My point is simply this: You</p> <p>2 would be guided by your experience and your</p> <p>3 knowledge of what an individual warning ought</p> <p>4 to be and whether it's an appropriate</p> <p>5 communication, not by a reference manual or a</p> <p>6 study that says this many warnings create</p> <p>7 clutter or any testable hypothesis, yours you</p> <p>8 would be testing to create answers, right?</p> <p>9 A. I don't know what you're trying</p> <p>10 to ask me, and I'm having a hard time giving</p> <p>11 you an answer because I'm sure if I give you</p> <p>12 an answer you're going to tell me it wasn't</p> <p>13 responsive to your question.</p> <p>14 Q. Likely.</p> <p>15 A. So please try to maybe break</p> <p>16 that question apart, rephrase it.</p> <p>17 Q. Well, my point was this: If</p> <p>18 you had a question as to whether a certain</p> <p>19 number of labels created clutter or</p> <p>20 interference of with a transmission of safety</p> <p>21 information, you would conduct a usability</p> <p>22 study in order to answer that question;</p> <p>23 correct?</p> <p>24 A. I would evaluate it, and</p>	<p style="text-align: right;">Page 212</p> <p>1 an on-product warning is necessary.</p> <p>2 What are the guidelines,</p> <p>3 factors that you have to consider?</p> <p>4 A. I went through them multiple</p> <p>5 times.</p> <p>6 Q. Are they written anywhere or is</p> <p>7 this just a general --</p> <p>8 A. They're written in the</p> <p>9 references I cited and other references. I</p> <p>10 determined an organization of warnings.</p> <p>11 Q. Those references give you the</p> <p>12 guidelines about -- I understand you have an</p> <p>13 opinion, all right. I want to look at what</p> <p>14 field that you claim expertise says about</p> <p>15 that. That's what I'm looking for.</p> <p>16 Is it these references?</p> <p>17 A. The easiest one to point is</p> <p>18 the -- I see the Warnings and Risk</p> <p>19 Communication most likely has a chapter</p> <p>20 dealing with the prioritization of warnings.</p> <p>21 I didn't bring a reference specifically cited</p> <p>22 to address that topic because it wasn't -- I</p> <p>23 didn't think it was relevant or necessary.</p> <p>24 Q. What, how to decide whether or</p>

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1 not you need an on-product warning, you didn't
2 think it was a relevant or necessary topic for
3 this deposition?
4 A. Well, BMW North America
5 determined what was needed.
6 Q. Well, you determined that their
7 determination was wrong?
8 A. No. I determined that it was
9 right. Then when they put on the warning on
10 the product in 1997 for the same type of
11 hazard, that was the appropriate thing to do.
12 What they did for the incident bike was
13 inappropriate.
14 Q. It's correct that BMW North
15 America didn't make those determinations.
16 That's the Defendant in this case. You're
17 aware of that, right?
18 A. I'm aware that BMW North
19 American administered the recall.
20 Q. Okay. They didn't make the
21 determinations?
22 A. They could have administered
23 however they wanted. They were the responding
24 party in this country.

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1 Q. Okay. So, I thought you were
2 giving me an answer and then you appeared to
3 back away from the answer in terms of the
4 guidelines that says and the factors that say
5 whether on-product is necessary or not?
6 A. Looking at chapter -- or
7 Reference 3, Wogalter and Vigilante, that's my
8 chapter in the Handbook of Warnings, I notice
9 the date on there is incorrect, it should be
10 2006, not 1999, does deal with location and
11 prioritization. Peters, 15 cardinal
12 principles to ensure effectiveness of warning
13 systems will deal with location of warning
14 information.
15 Q. Any others?
16 A. I'm not seeing offhand.
17 Q. So, if I read that, I'll
18 understand the factors that one would apply to
19 determine whether an on-product is necessary;
20 correct?
21 A. I don't know what you
22 understand, but the information is in there.
23 Q. Let's say somebody who
24 understands would be able to follow guidelines

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1 that you embrace and say this warning
2 qualifies or this warning doesn't?
3 A. I think your expert referred to
4 the Handbook of Warnings that I authored, two
5 chapters and edited two other chapters in his
6 report. So I think that's probably a very
7 good resource for you.
8 Q. Okay. Let's assume we have a
9 purchaser of a used motorcycle who didn't get
10 the manual. Are you with me?
11 A. Sure.
12 Q. What information can you think
13 of, as you sit here, needn't be an exhaustive
14 list, but what information would that person
15 need to know before he or she got on the
16 motorcycle or attempted to operate it?
17 A. It depends.
18 Q. On what?
19 A. Their experience, the manner in
20 which it's set out. Maybe the person selling
21 it to them gave them some tips and
22 information.
23 Mr. Yazdani testified he didn't
24 read the manual until after he drove the thing

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1 back to Boston. So he's on a multi hundred
2 mile trip before ever picking up and reading
3 that manual.
4 Q. Do you think that's a good
5 idea?
6 A. Yes. We talked about this
7 before. I think it's reasonable that if you
8 don't feel that you need to read the manual,
9 that many people, reasonable people won't read
10 the people. That's why you can't depend upon
11 the manual to inform them of critical safety
12 information.
13 So, you know, it gets back to
14 the question if you feel you need to read the
15 manual, if you have no idea how to use the
16 product, then it's probably necessary and
17 reasonable for you to read a manual.
18 I bought my new car in
19 December. I drove home from the dealer
20 without reading the manual. It's a several
21 hundred page manual. I can tell you I haven't
22 read the thing front to back because I don't
23 have the time to do it. So I looked at some
24 information that I was interested in that I

<p style="text-align: right;">Page 217</p> <p>1 didn't need to know like how to set the 2 navigation, and that's it. 3 If there was something uniquely 4 dangerous about that car I would have hoped 5 that the dealer and/or the on-product warning 6 would have told me. 7 Q. Let's use the most common 8 denominator, a used purchaser who might not 9 know very much, bought it used? 10 A. How do you know they don't know 11 it very much? 12 Q. Let me ask you this: You've 13 been critical of the reliance on the manual to 14 communicate important safety information to 15 secondhand purchasers who may not get the 16 manual. So if that's the case, doesn't there 17 have to be some baseline of basic information 18 that should be communicated if your criticism 19 is valid, in some other method? 20 A. Sure. 21 Q. I'm not asking for the 22 baseline. 23 A. Sure, absolutely. 24 Q. Okay. So what's the baseline?</p>	<p style="text-align: right;">Page 219</p> <p>1 product out on the market that is like a 2 motorcycle, but has different controls, maybe 3 there's no hand levers, maybe there's three 4 pedals on one side and none on the other, then 5 you're probably going to need a manual or if 6 somebody teaches you how to use it or how to 7 ride it. 8 But if you're talking about 9 basic operation, there's no need to read the 10 manual. If you're not planning on doing your 11 own maintenance, as Mr. Yazdani apparently 12 wasn't, there's no reason to go into the 13 manual to figure out all these different 14 things related to maintenance. You take it to 15 the shop, and BMW North America makes money 16 because the dealer charges a lot to have you 17 maintain the bike. So, again, it's a -- it 18 just depends on the bike and the situation. 19 Q. Do you think you answered my 20 question? 21 MR. LEVINE: I actually think 22 he gave you more than you ever asked for. 23 MR. HEINOLD: Oh, absolutely. 24 You think the answer's in there?</p>
<p style="text-align: right;">Page 218</p> <p>1 A. The baseline, for example, with 2 a motorcycle is that they are typically 3 operated the same way. They have two levers 4 at the handlebars, one's a clutch, one's a 5 brake, they have two pedals, one on each side, 6 one's for the gears, one's for the rear 7 brakes. If a person gets on a motorcycle 8 they've never driven before and the buttons 9 for start, stop, or what have you, are clearly 10 labeled, they would probably get on that 11 motorcycle and drive away. 12 Now, you do recall that I had 13 three used Harley-Davidsons and I'm not sure 14 that one of them came with an Operator Manual, 15 but I do know when I rode it home from where I 16 bought it I didn't read any of the Operator 17 Manuals. I think at least two, if not all 18 three of them, I didn't get the manual until 19 much later until, which means I had been 20 riding around on that bike for a while without 21 reading and never did I feel unsafe or never 22 did I feel that I was doing something wrong or 23 unsafe or incorrect. 24 Now, if you were to put a</p>	<p style="text-align: right;">Page 220</p> <p>1 MR. LEVINE: I do believe the 2 answer to that one is in there. 3 You are asking him some 4 questions about minimal things that -- you're 5 very broad in these circumstances. 6 MR. HEINOLD: Absolutely. 7 MR. LEVINE: You're very broad 8 in these circumstances. So his answer, to be 9 complete, is to be very broad as well. I 10 think that it is very hard in this instance to 11 come up with a very concise question that will 12 allow for a very concise answer when you're 13 talking about these warnings topics. 14 But keep trying, and if I think 15 he's offensive or going astray, as I have in 16 the past, I would either cut him off, I'll ask 17 him to answer directly. I'm more helpful than 18 the average opposing counsel. 19 MR. HEINOLD: You probably are, 20 but I agree to disagree on this one. 21 MR. LEVINE: Okay. 22 THE WITNESS: Do you mind if we 23 take a five-minute break? 24 MR. HEINOLD: Sure.</p>

<p style="text-align: right;">Page 221</p> <p>1 ---</p> <p>2 (Whereupon, a short break was taken at</p> <p>3 this time.)</p> <p>4 ---</p> <p>5 BY MR. HEINOLD:</p> <p>6 Q. Do you think the warning that</p> <p>7 you've been discussing about the risk of fire</p> <p>8 is the most important warning in regard to</p> <p>9 operating this motorcycle?</p> <p>10 A. The most important warning with</p> <p>11 respect to my opinions in this case, yes.</p> <p>12 Q. With respect to operating the</p> <p>13 motorcycle?</p> <p>14 A. I don't think I went through</p> <p>15 all the different warnings for operating</p> <p>16 motorcycles.</p> <p>17 Q. So the answer is you don't</p> <p>18 know?</p> <p>19 A. I don't know.</p> <p>20 Q. This proposed warning on Page</p> <p>21 14, what size is it?</p> <p>22 A. That's actually the size that I</p> <p>23 intended. No, I take that back. I did print</p> <p>24 out the actual size. That's about the size I</p>	<p style="text-align: right;">Page 223</p> <p>1 where you think it should be in order to be</p> <p>2 effective?</p> <p>3 A. There's multiple locations, but</p> <p>4 I'll be happy to.</p> <p>5 Q. Identify as many of them as you</p> <p>6 can, please.</p> <p>7 A. (Witness indicates.)</p> <p>8 Q. Can you prioritize which ones</p> <p>9 you think is best or how did you reach that</p> <p>10 decision?</p> <p>11 A. I think they all would be fine</p> <p>12 (indicating).</p> <p>13 Q. Are you finished?</p> <p>14 A. Yes.</p> <p>15 MR. LEVINE: For the record,</p> <p>16 the witness put X marks on I believe four</p> <p>17 locations on two pictures.</p> <p>18 ---</p> <p>19 (Whereupon, Exhibit Vigilante-6 was</p> <p>20 marked for identification.)</p> <p>21 ---</p> <p>22 BY MR. HEINOLD:</p> <p>23 Q. Page 15 of your report --</p> <p>24 A. Okay.</p>
<p style="text-align: right;">Page 222</p> <p>1 intended.</p> <p>2 MR. HEINOLD: Let's mark this</p> <p>3 as an Exhibit.</p> <p>4 ---</p> <p>5 (Whereupon, Exhibit Vigilante-5 were</p> <p>6 marked for identification.)</p> <p>7 ---</p> <p>8 MR. HEINOLD: I don't know if</p> <p>9 we gave a list of the Exhibits thus far.</p> <p>10 Vigilante-1 is the report. Exhibit 2 is the</p> <p>11 Testimony List. Exhibit 3 is the C.V.</p> <p>12 Exhibit 4 is what was marked as Yazdani-1.</p> <p>13 And Exhibit 5 is the actual warning and size</p> <p>14 which the witness has printed and provided.</p> <p>15 BY MR. HEINOLD:</p> <p>16 Q. Where would you place it</p> <p>17 precisely?</p> <p>18 A. Oh, I don't know that I have to</p> <p>19 be pinned down to a precise location, but</p> <p>20 certainly on top of the gas tank, on the</p> <p>21 handlebars between the clamps and then on the</p> <p>22 console or even on the center pivot.</p> <p>23 Q. Can you take whatever photo</p> <p>24 you're referring to and pull it out and mark</p>	<p style="text-align: right;">Page 224</p> <p>1 Q. Finding number 4, you say that:</p> <p>2 This warning failed to meet contemporary</p> <p>3 industry standards, guidelines and practices.</p> <p>4 Can you identify what those</p> <p>5 contemporary industry standards, guidelines</p> <p>6 and practices are?</p> <p>7 A. Sure, Page 17, I'll just give</p> <p>8 you the numbers, if that's okay.</p> <p>9 Q. All right.</p> <p>10 A. Number one, these are my</p> <p>11 references --</p> <p>12 Q. On Page 17, sorry.</p> <p>13 A. Number 1, Number 2, Number 3,</p> <p>14 Number 4, Number 5, Number 6.</p> <p>15 Q. 1, 2, 3, 4, 5, 6, is that what</p> <p>16 you said?</p> <p>17 A. Yes.</p> <p>18 Q. 1 through 6?</p> <p>19 A. Yes, and then -- that's fine.</p> <p>20 Q. And do you believe that the</p> <p>21 warning in the manual violated ANSI Z535.4?</p> <p>22 A. I'm sorry, one more time. Do I</p> <p>23 believe that it violated it?</p> <p>24 Q. Is it your opinion that the</p>

<p style="text-align: right;">Page 225</p> <p>1 warnings on this issue in the manual violated 2 ANSI Z535.4? 3 A. That's for on-product safety 4 signs and labels. This is in a manual. 5 Q. So the failure to comply is 6 because there was no on-product safety? 7 A. Yes. 8 Q. Okay. Do you believe that the 9 on-product label that was provided with the 10 recall product, provided to the recall product 11 violated Z535.4? 12 A. Well, it depends on which part. 13 MR. LEVINE: I think he was 14 done with his answer, by the way. 15 MR. HEINOLD: It depends on 16 which part. I guess I was waiting for him to 17 tell me which part violates it and which part 18 doesn't. 19 THE WITNESS: I'm sorry, I was 20 trying to keep the answer short. 21 BY MR. HEINOLD: 22 Q. Which part violates it and what 23 part doesn't? 24 A. Well, the on-product where ANSI</p>	<p style="text-align: right;">Page 227</p> <p>1 not signal word header, orange, safety orange, 2 no border. 3 Q. Is Z535.4 mandatory? 4 A. Is it mandatory? No, it's 5 not -- well, I'm sorry, it depends. 6 Q. What does it depend on? 7 A. It depends on whether there's a 8 Federal regulation that calls out the 9 requirement to meet it or not. So there are 10 some Federal regs that require it be met. But 11 in this case I don't think it's required. So 12 sorry. 13 Q. In this case, Mr. Yazdani's 14 intention was to start the motorcycle, to warm 15 it up, go outside and smoke a cigarette for 16 seven or nine minutes, come back and turn it 17 off. Is that your understanding? 18 A. That's my understanding. 19 Q. All right. And is it your 20 understanding he got distracted and forgot? 21 A. That's my understanding. 22 Q. And that he walked back through 23 the garage where the motorcycle was running 24 and went back into the house?</p>
<p style="text-align: right;">Page 226</p> <p>1 Z535.2 requires it be located at the time and 2 location the information necessary is met. 3 But the parts requiring signal word were not 4 met. The parts requiring the formatting of 5 the signal word were not met. Parts 6 recommending a border were not met. Parts 7 recommending a signal word icon were not met. 8 Q. You said signal word -- 9 A. Icon? 10 Q. No. Then you said a second 11 thing. Then you said border and then you said 12 a signal word icon. 13 A. Oh, I'm sorry, the first was 14 just a signal word. 15 Q. Right. And then what was the 16 second one? 17 A. I said there was -- I don't 18 remember the order of them. 19 Q. You said four. I only wrote 20 down three. We can read it back or you can 21 tell me the four again. 22 A. There was no signal word, no 23 signal word icon. There's no format. A 24 signal word header is not format. There was</p>	<p style="text-align: right;">Page 228</p> <p>1 A. A little bit fuzzy what you're 2 trying to say there. 3 MR. LEVINE: He asked for the 4 last two factors you put before him. 5 BY MR. HEINOLD: 6 Q. That he went from outside the 7 garage door that was open back through the 8 garage and into his house to talk on the 9 phone. Is that your understanding? 10 A. I would say my understanding is 11 that he walked through the garage into the 12 house. I don't know that he walked back from 13 outside. So you put that caveat on there. 14 I'm not sure that's a hundred percent -- my 15 understanding is he walked from the garage 16 into the house. 17 Q. Okay. 18 A. And the bike was running in the 19 garage. I agree with all that. 20 Q. There was a two-car garage with 21 one door opening? 22 A. Two-car garage. I don't 23 remember if it was one or two doors open, but 24 one or the other.</p>

<p style="text-align: right;">Page 229</p> <p>1 Q. Does that matter to you?</p> <p>2 A. No.</p> <p>3 Q. Do you agree that on that date</p> <p>4 he didn't act as he intended to act when he</p> <p>5 started the motorcycle?</p> <p>6 A. Sure.</p> <p>7 Q. Do you believe that an</p> <p>8 on-product warning that satisfies your</p> <p>9 requirements, as you suggested, would have</p> <p>10 caused him not to be distracted and forget the</p> <p>11 motorcycle was running and then go into the</p> <p>12 house?</p> <p>13 A. I don't think it would have</p> <p>14 caused him not to be distracted. I think it</p> <p>15 would have informed him that he shouldn't let</p> <p>16 the bike run at a standstill. Therefore, he</p> <p>17 wouldn't have started it in the first place.</p> <p>18 Q. What is your basis for that?</p> <p>19 A. The basis is that he would have</p> <p>20 been provided with the warning and the</p> <p>21 information he needed to understand the hazard</p> <p>22 and that when he was planning on doing,</p> <p>23 letting it run seven to 10 minutes was not</p> <p>24 safe because it could result in a fire.</p>	<p style="text-align: right;">Page 231</p> <p>1 have. Is there some technique, something you</p> <p>2 rely on to say that Mr. Yazdani would or would</p> <p>3 not have followed the warning?</p> <p>4 A. Sure.</p> <p>5 Q. What is it?</p> <p>6 A. Well, I would look at his</p> <p>7 testimony and his statements to see if there's</p> <p>8 anything to indicate that he's not a</p> <p>9 reasonable person that wouldn't act like the</p> <p>10 majority of people would act. And I don't see</p> <p>11 anything in his testimony to suggest that he</p> <p>12 wouldn't have acted like the majority of</p> <p>13 people or the way you expect the majority of</p> <p>14 the people to act.</p> <p>15 And number two, he testified</p> <p>16 that he wasn't aware of the hazard before he</p> <p>17 did what he did.</p> <p>18 Q. Is there any literature which</p> <p>19 discusses the limitations of on-product</p> <p>20 warnings?</p> <p>21 A. Well, I think the answer to</p> <p>22 your question is that most warnings literature</p> <p>23 recognize the limitations of using an</p> <p>24 on-product warning saying it's a hazard,</p>
<p style="text-align: right;">Page 230</p> <p>1 Q. People don't always follow</p> <p>2 warnings and instructions; correct?</p> <p>3 A. They absolutely do not, that's</p> <p>4 why you try to eliminate them by design,</p> <p>5 provide the necessary safeguards and not rely</p> <p>6 upon warnings.</p> <p>7 Q. But you do agree that people</p> <p>8 don't always follow warnings?</p> <p>9 A. I absolutely agree with that.</p> <p>10 Q. And what is your basis for</p> <p>11 saying that Mr. Yazdani would have followed</p> <p>12 this particular warning?</p> <p>13 A. A couple things. Number one,</p> <p>14 he wasn't aware of the hazard that he was</p> <p>15 exposed to when he started the bike to leave</p> <p>16 it run for even seven to nine minutes.</p> <p>17 And two, there's a litany of</p> <p>18 research out there that shows if you provide</p> <p>19 adequate warnings most people will follow,</p> <p>20 see, understand and comply with an on-product</p> <p>21 warning.</p> <p>22 Q. Is there some type of technique</p> <p>23 to decide whether he would or would not</p> <p>24 have -- I mean, you have an opinion it would</p>	<p style="text-align: right;">Page 232</p> <p>1 particularly when there are design regarding</p> <p>2 solutions available.</p> <p>3 Q. Is there any literature which</p> <p>4 discusses the limitations and the</p> <p>5 effectiveness of an on-product warning itself?</p> <p>6 A. Well, there certainly are</p> <p>7 studies that have been done on the</p> <p>8 effectiveness of adequate warnings to change</p> <p>9 behavior. And a good one, I don't know if I</p> <p>10 referenced it or not, but it's done by Cox and</p> <p>11 Wogalter, it was a Met-analysis done on the</p> <p>12 effectiveness of warnings, and they showed</p> <p>13 that, in fact, when you provide adequate</p> <p>14 warnings they do change behavior.</p> <p>15 MR. LEVINE: Can you tell her</p> <p>16 the name of the two authors?</p> <p>17 THE WITNESS: Cox, C-O-X, and</p> <p>18 Wogalter. And then I note from my own</p> <p>19 research in my own experience in designing and</p> <p>20 developing on-product warnings that when you</p> <p>21 provide effective and adequate on-product</p> <p>22 warnings they do, in fact, change behavior.</p> <p>23 BY MR. HEINOLD:</p> <p>24 Q. Which studies have you</p>

<p style="text-align: right;">Page 233</p> <p>1 researched for that?</p> <p>2 A. Well, to give you an example,</p> <p>3 some of the technical reports I wrote that</p> <p>4 would -- on Page 9 of my C.V., second to the</p> <p>5 last page, there's a technical report dealing</p> <p>6 with the feasibility and competitive</p> <p>7 evaluation of the IBM high rate wireless land</p> <p>8 PC card, and the part of that testing had to</p> <p>9 do so with testing the provisions of a warning</p> <p>10 on the product.</p> <p>11 Q. What was the warning?</p> <p>12 A. The warning basically said that</p> <p>13 the PC card needed to be installed after the</p> <p>14 drivers was installed, otherwise it wouldn't</p> <p>15 work. And it was a -- you want me to explain</p> <p>16 all of it? Because I want to keep things</p> <p>17 short.</p> <p>18 Q. Thirty words or less.</p> <p>19 A. When they designed the wireless</p> <p>20 card they should have designed it so that it</p> <p>21 worked, the install worked regardless whether</p> <p>22 you put the PC card in first or not. But the</p> <p>23 way they designed the driver, the driver had</p> <p>24 to be installed first before the PC card.</p>	<p style="text-align: right;">Page 235</p> <p>1 Q. How about the effectiveness</p> <p>2 study of Cox and Wogalter, was that a peer</p> <p>3 reviewed study?</p> <p>4 A. Yes. And the other study I was</p> <p>5 looking for was the December 1999 Ideascan</p> <p>6 2000, usability study and competitive</p> <p>7 evaluation. And this looked at the</p> <p>8 effectiveness of adding a warning to the</p> <p>9 scanner to prevent another damage to the</p> <p>10 scanner.</p> <p>11 Q. Another IBM? I didn't find it</p> <p>12 yet. What page is it?</p> <p>13 A. It's on the second to the last</p> <p>14 page.</p> <p>15 Q. And that's another IBM internal</p> <p>16 use?</p> <p>17 A. Technical Report.</p> <p>18 Q. Any others?</p> <p>19 A. They're the only two I believe</p> <p>20 that I wrote, technical reports.</p> <p>21 Q. My question was literature on</p> <p>22 the effectiveness and/or limitations on</p> <p>23 on-product warnings?</p> <p>24 MR. LEVINE: I'm sorry, can you</p>
<p style="text-align: right;">Page 234</p> <p>1 And I told them that most</p> <p>2 people are going to put the PC card in first</p> <p>3 and then try and install the driver, and when</p> <p>4 they do that they're going to cause a problem,</p> <p>5 which is going to drive the help call, service</p> <p>6 call.</p> <p>7 So the compromise they did for</p> <p>8 the initial release of the product was to put</p> <p>9 a warning on the plastic case of the PC card</p> <p>10 saying, Don't install the PC until you</p> <p>11 installed the driver. And that was a</p> <p>12 workaround until they fixed the driver issue.</p> <p>13 Q. So was that a study that you</p> <p>14 did?</p> <p>15 A. Yes, part of a usability test.</p> <p>16 Q. Peer reviewed?</p> <p>17 A. I don't know if it was peer</p> <p>18 reviewed in a classical sense.</p> <p>19 Q. Published?</p> <p>20 A. It was published as an IBM</p> <p>21 Technical Report.</p> <p>22 Q. Within IBM?</p> <p>23 A. Yes. It was implemented in the</p> <p>24 design of the product and sold.</p>	<p style="text-align: right;">Page 236</p> <p>1 repeat the question.</p> <p>2 BY MR. HEINOLD:</p> <p>3 Q. The effectiveness or</p> <p>4 limitations on on-product warnings.</p> <p>5 A. Well, there's other examples.</p> <p>6 So, for, example, Reference 11 looked at the</p> <p>7 compliance to Owner's Manuals warnings,</p> <p>8 influence of familiarity and placement of a</p> <p>9 supplemental directive. So in that study they</p> <p>10 put a warning label, an abbreviated warning</p> <p>11 label on the device pointing to the manual or</p> <p>12 additional information regarding the</p> <p>13 particular problem versus just having the</p> <p>14 information in the manual.</p> <p>15 Q. And that's a 1995 study?</p> <p>16 A. Yes.</p> <p>17 Q. Is that peer reviewed?</p> <p>18 A. Yes, it's in the Journal of</p> <p>19 Ergonomics.</p> <p>20 Q. I assume you provided me with a</p> <p>21 copy of that?</p> <p>22 A. It's on the disk.</p> <p>23 Q. Any others?</p> <p>24 A. I mean, I can -- if you give me</p>

<p style="text-align: right;">Page 237</p> <p>1 time I can come up with other ones, but 2 they're the ones that I have referenced either 3 in my report or in my C.V. 4 Q. So let me go back to usual 5 distraction. Is it your opinion that that 6 doesn't matter because he wouldn't have been 7 doing the activity to begin with, the fact 8 that he was distracted and forgot? 9 A. Right. The distraction is 10 irrelevant. The question is whether or not he 11 had the information he needed to leave the 12 bike in the first place. 13 Q. Will you agree with me if Mr. 14 Yazdani had read the Manual and had understood 15 the warning and had followed the warning, he 16 would not have left the motorcycle idling at a 17 standstill in his garage on that day? 18 A. If he followed BMW's intention 19 for the warning in the Manual he wouldn't have 20 left it running at a standstill in the garage. 21 Q. And if he had read the Manual 22 and he had understood the Manual prior to this 23 incident, the existence or nonexistence of the 24 label you propose on the motorcycle would not</p>	<p style="text-align: right;">Page 239</p> <p>1 warning would have -- its presence or absence 2 would have no causal effect on this incident. 3 Do you agree with that? 4 A. It would reinforce what he had 5 read and remembered. 6 Q. If he remembered it, does he 7 need to be reinforced? 8 A. Sure. 9 Q. If he remembered it and he 10 wasn't reinforced, would he still do the 11 prohibited act? 12 A. If he remembered -- my opinion 13 is if he had read the Manual, read Pages 51 14 and 60, understood what BMW was trying to 15 communicate to him, and then practiced that 16 and recalled that at the time he wouldn't have 17 done what he did. 18 Q. And therefore, the existence or 19 nonexistence of the label on the motorcycle 20 would have no causal effect to this incident; 21 correct? 22 A. The only thing it would have 23 served in that purpose was to remind him and 24 reinforce what he had remembered and read and</p>
<p style="text-align: right;">Page 238</p> <p>1 matter; correct? 2 A. That's not true. 3 Q. Okay. Why would it matter? 4 A. Well, first of all, the warning 5 needs to be on the bike regardless of whether 6 Mr. Yazdani ever purchases the bike. So it 7 should have been there when he got it. 8 Number two, if Mr. Yazdani did 9 happen to read the Manual, did happen to read 10 all the Manual, did happen to read all of 51 11 and 60 to understand exactly what BMW was 12 trying to communicate to him, and then 13 subsequently forgot it, the warning would have 14 reminded him at the time of location it was 15 needed. If read it and remembered it, the 16 warning on the bike would have reinforced what 17 he had read in the Manual encouraging him not 18 to do what he did. 19 Q. Assuming he had read it, read 20 these warnings, okay, assume he understood 21 what BMW was trying to tell him about not 22 running at a standstill, idling at a 23 standstill because of the risk of fire, and 24 assume he remembered that, then the on-product</p>	<p style="text-align: right;">Page 240</p> <p>1 understood. 2 Q. But if he wasn't going to do it 3 anyway, which we just agreed under my 4 hypothetical, then it wouldn't have mattered 5 whether it was on there or not; correct? 6 A. I would agree if he knew that 7 there was a risk of fire by letting the bike 8 idle in a stationary position, decided to do 9 it anyway, the warning wouldn't have changed 10 his mind. That's why you want to eliminate 11 through design or by safeguard. 12 Q. I want to get your opinion on 13 this clearly and cleanly. 14 We're going to assume for 15 purposes of my question that he had read the 16 appropriate pages in the Manual regarding the 17 risk of fire if he ran the engine at a 18 standstill, okay? So we're assuming that; 19 correct? 20 A. Okay. 21 MR. LEVINE: Your question is 22 assuming that. 23 MR. HEINOLD: My question is 24 assuming that.</p>

<p style="text-align: right;">Page 241</p> <p>1 MR. LEVINE: Fair enough. 2 BY MR. HEINOLD: 3 Q. I'm asking you to assume that. 4 A. Okay. 5 Q. And I'm asking you to further 6 assume that when he read those pertinent 7 portions of the Manual he understood the risk 8 that was being conveyed in those lines, okay? 9 A. Okay. 10 Q. And I want you to further 11 assume that he remembered it; correct? Okay? 12 A. Okay. 13 Q. If you make those three 14 assumptions, then he wouldn't need a reminder 15 on the motorcycle to change his conduct; 16 correct? 17 A. If he remembered it at the time 18 he went out to start the bike he wouldn't need 19 a reminder. 20 Q. Okay. And therefore, if he 21 read it and if he understood it and if he 22 remembered it he wouldn't -- the label, 23 whether it is there or not, is of no 24 consequence; correct?</p>	<p style="text-align: right;">Page 243</p> <p>1 agreed that if he read it, understood it and 2 remembered it, he wouldn't be doing it in the 3 first place which is why there's no causal 4 connection, which you also agreed to; correct? 5 A. If he read it, fully understood 6 it and remembered it at the time and did it 7 anyways, like I said, the on-product warning 8 may have reinforced the manual, but I doubt it 9 would have changed his behavior if he was 10 intending to disregard what he had known and 11 remembered otherwise. 12 Q. As the owner of a motorcycle, 13 did Mr. Yazdani have a responsibility to read 14 the Manual? 15 A. If he didn't know how to 16 operate the bike, then I would suggest he had 17 a responsibility to read it. 18 Q. But if you thought he knew how 19 to operate it, it's okay with you that he 20 didn't read it? 21 A. I think it's a reasonable thing 22 that many reasonable people do often. 23 Q. But reasonable people do things 24 that they shouldn't do and they don't do</p>
<p style="text-align: right;">Page 242</p> <p>1 MR. LEVINE: To this case? 2 MR. HEINOLD: To this case. 3 THE WITNESS: But to causation 4 it's not, but the bike is still defective 5 without it. 6 BY MR. HEINOLD: 7 Q. Okay, I understand that. But 8 to causation it's not? 9 A. To causation, if he was aware 10 of the hazard, was thinking about it at the 11 time and recalled and made a decision, made a 12 conscious decision to disregard the 13 information he had, then the label wouldn't 14 have done anything except reinforce what he 15 read in the Manual. 16 Now, is it possible that by 17 reinforcing it it would have changed his 18 behavior, it's possible. Is it as likely as 19 if he didn't know when the warning was there 20 to tell him, I don't think it's -- we're 21 looking at degrees, that's similar of a 22 degree. 23 Q. If it was going to change 24 behavior he would do it because you already</p>	<p style="text-align: right;">Page 244</p> <p>1 things that they should do. 2 My question is not whether it 3 was reasonable to you to do, but does he have 4 a responsibility -- you're a warnings expert, 5 does the owner of the product, in this case a 6 motorcycle, have the responsibility to read 7 the Manual? 8 A. If he didn't know how to 9 operate the bike he should have read the 10 manual to find out how to operate it. 11 Q. And if he knew how -- if he 12 thought he knew how to operate it, then he has 13 no responsibility, in your opinion, to read 14 the manual? 15 A. I don't think so. 16 Q. Do you think that his failure 17 to read the manual if, in fact, he didn't read 18 the manual, gives him any responsibility for 19 this fire? 20 A. I don't think you can hold him 21 to be responsible for the fire when he wasn't 22 aware of the atypical, unique hazard 23 associated with the bike. 24 Q. But he might have been aware if</p>

<p style="text-align: right;">Page 245</p> <p>1 he read the manual?</p> <p>2 A. I doubt it.</p> <p>3 Q. He might have been?</p> <p>4 A. I doubt it.</p> <p>5 Q. I know you doubt it.</p> <p>6 A. It's my professional --</p> <p>7 Q. Are you certain of it?</p> <p>8 A. Within a reasonable degree of</p> <p>9 scientific certainty.</p> <p>10 Q. What does that mean?</p> <p>11 A. It means more likely than not</p> <p>12 that the information in the Manual was</p> <p>13 inadequate to convey the information that BMW</p> <p>14 North America is claiming they intended to</p> <p>15 convey.</p> <p>16 Q. That's 50.1 percent, right?</p> <p>17 A. Sure.</p> <p>18 Q. Are you more certain than that?</p> <p>19 A. I don't have to be.</p> <p>20 Q. So your answer is no?</p> <p>21 A. My answer is I don't have to</p> <p>22 be.</p> <p>23 Q. Are you more certain than 50.1</p> <p>24 percent? That's a yes or no. Either you are</p>	<p style="text-align: right;">Page 247</p> <p>1 there's some possibility that he would have</p> <p>2 understood it? And you said, Eventually, more</p> <p>3 likely than not. And I said, That means 50.1</p> <p>4 percent? And you agreed. And then I said,</p> <p>5 and this is the question, Are you certain</p> <p>6 beyond 50.1 percent? And you said, I don't</p> <p>7 have to be.</p> <p>8 A. Correct. So you want me to</p> <p>9 answer it again?</p> <p>10 Q. No. If that's your answer,</p> <p>11 then that's the one you're going to live with.</p> <p>12 Do you believe that the</p> <p>13 Plaintiff's failure, Mr. Yazdani -- let me</p> <p>14 start that over.</p> <p>15 Do you believe that Mr.</p> <p>16 Yazdani's failure to understand the features</p> <p>17 and characteristics of his motorcycle with</p> <p>18 regard to idling at a standstill gives him</p> <p>19 responsibility for this fire?</p> <p>20 A. You're going to have to do that</p> <p>21 one more time.</p> <p>22 Q. Do you believe that Mr.</p> <p>23 Yazdani's failure to understand the features</p> <p>24 and characteristics of his motorcycle with</p>
<p style="text-align: right;">Page 246</p> <p>1 or you aren't.</p> <p>2 MR. LEVINE: Just so when you</p> <p>3 use this against him later, he at least knows</p> <p>4 what question he's more than 50.1 percent.</p> <p>5 MR. HEINOLD: The one that</p> <p>6 we've been asking.</p> <p>7 MR. LEVINE: Whether or not Mr.</p> <p>8 Yazdani would have understood the risk if he</p> <p>9 read the manual? Is that the question?</p> <p>10 Because that's what I thought the question is.</p> <p>11 MR. HEINOLD: Yes.</p> <p>12 THE WITNESS: One more time,</p> <p>13 please.</p> <p>14 BY MR. HEINOLD:</p> <p>15 Q. The question is this: Let me</p> <p>16 preface the question with what you previously</p> <p>17 said so we can put it into context.</p> <p>18 I asked you were whether his</p> <p>19 failure to read the Manual gave him any</p> <p>20 responsibility for this fire, and you said,</p> <p>21 no, because he didn't know the risk. And I</p> <p>22 said, But could he have learned the risk if he</p> <p>23 read the manual? And you said, I doubt it.</p> <p>24 And I said, If you doubt it, that means</p>	<p style="text-align: right;">Page 248</p> <p>1 regard to idling at a standstill and the risk</p> <p>2 of fire gives him responsibility for this</p> <p>3 event?</p> <p>4 A. I don't think he's responsible</p> <p>5 for it.</p> <p>6 Q. Why not?</p> <p>7 A. Because BMW North America</p> <p>8 failed to provide adequate warning.</p> <p>9 Q. And does that excuse his</p> <p>10 failure to investigate the characteristics and</p> <p>11 features of his bike regarding the risk of</p> <p>12 fire at a standstill?</p> <p>13 A. How does he know to investigate</p> <p>14 it?</p> <p>15 Q. I get to ask the questions.</p> <p>16 A. I'm sorry. It's late in the</p> <p>17 day, excuse me. I don't know that he knows</p> <p>18 that he has to investigate it, that's why he</p> <p>19 haven't investigated it. And he doesn't know</p> <p>20 to investigate it because BMW North America</p> <p>21 failed to provide adequate warning.</p> <p>22 Q. Do you believe -- let's assume</p> <p>23 he read it, okay, and understood it, do you</p> <p>24 believe his failure to remember it gives him</p>

<p style="text-align: right;">Page 249</p> <p>1 any responsibility for the fire? 2 A. So you're asking me if his 3 failure to be human makes him responsible for 4 the fire? I don't think so. 5 Q. No, that's not what I'm asking. 6 A. Sure it is. 7 Q. That's your interpretation of 8 and your spin as a hired gun. 9 My question is: If he read it 10 and he understood it and he forgot it, does 11 that give him any responsibility for this? 12 A. It happens all the time. 13 Q. Is your answer no? 14 A. My answer is without adequate 15 warning he was not responsible for it. 16 Q. Is your answer no? 17 A. Without adequate warning his 18 responsibility would be no. 19 Q. Zero? 20 A. Sure. 21 Q. Okay. Do you believe that Mr. 22 Yazdani forgetting that his motorcycle was 23 running in his garage and going into his house 24 gives him any responsibility for this event?</p>	<p style="text-align: right;">Page 251</p> <p>1 second page. I got them, I'm sorry. 2 Q. Four pages? 3 A. Yes. 4 Q. What is that? 5 A. It's a publication entitled 6 Sound Rider. Well, it's a website called 7 Sound Rider, a motorcyclist enthusiast 8 website, and there's an article called Half 9 A\$\$ Winterization. 10 And basically, it's just an 11 explanation from the author as how he 12 winterizes his motorcycle and still allows him 13 to ride during the off season when it's a 14 little bit warmer. And his process is, you 15 know, essentially what Mr. Yazdani was doing 16 on the day of the incident. 17 And he notes that he once every 18 couple weeks let's the engine run for 15 to 20 19 minutes at least once a week during the cold 20 season even if you're not riding. 21 Q. Is that an air-cooled? 22 A. I don't think he ever 23 references whether it's air-cooled or 24 liquid-cooled.</p>
<p style="text-align: right;">Page 250</p> <p>1 A. Not without knowing the risk. 2 MR. HEINOLD: I'd like to get 3 those copies. 4 MR. LEVINE: Sure, let me do 5 that. 6 --- 7 (Whereupon, a short break was taken at 8 this time.) 9 --- 10 BY MR. HEINOLD: 11 Q. We took a break, you provided 12 me with some additional materials from your 13 notebook that you brought here. Let me just 14 ask you what some of these are. 15 MR. HEINOLD: You can mark this 16 as Vigilante-7. 17 --- 18 (Whereupon, Exhibit Vigilante-7 was 19 marked for identification.) 20 --- 21 BY MR. HEINOLD: 22 Q. I think these go together. It 23 looks like a website? 24 A. Yes, but I don't have the</p>	<p style="text-align: right;">Page 252</p> <p>1 Q. Okay. Anything else 2 significant about that? 3 A. No. You know, I just came 4 across an article in a rider enthusiast 5 website that explains what Mr. Yazdani was 6 doing. 7 Q. What is the next one? Do these 8 four pages go together? 9 A. Yes. 10 Q. And what is that? 11 MR. HEINOLD: Let's mark that 12 as 8. 13 --- 14 (Whereupon, Exhibit Vigilante-8 was 15 marked for identification.) 16 --- 17 BY MR. HEINOLD: 18 Q. Explain what Exhibit 8 is. 19 A. It's another website for 20 motorcycle enthusiasts. The one thing that I 21 noticed in here is that the author makes a 22 statement that most people say that 23 Harley-Davidsons never overheat. And then 24 there's some examples of one of the people</p>

<p style="text-align: right;">Page 253</p> <p>1 that commented, I don't know who it is, but 2 just an example of sitting in traffic in 3 Myrtle Beach and couldn't move and eventually 4 had to pull over and turn off because 5 the -- to cool the bike off. 6 Another guy was noticing that 7 his VTX has a fan that comes on just like a 8 car to keep the cooling even at a stopped 9 light. That was just one of the things I ran 10 into. 11 MR. HEINOLD: Let's mark this 12 as 9. 13 --- 14 (Whereupon, Exhibit Vigilante-9 was 15 marked for identification.) 16 --- 17 BY MR. HEINOLD: 18 Q. How about the next one? 19 A. The next one is from The 20 American Spectator. Looks like it's an 21 organization related to vehicles. The author 22 is a columnist for automotive and vehicle 23 related topics. It just gives a description 24 of air-cooled versus water-cooled engines.</p>	<p style="text-align: right;">Page 255</p> <p>1 the bike alone, no adding upgrades to the 2 pistons or what have you, simply change the 3 oil and filter every now and then you'll 4 probably never have any problems, period. 5 Q. Anything else? 6 A. No. 7 Q. Is that a two-page article? 8 A. I also attached the -- you see 9 in your hand right there, that's just his 10 Bio. You see the Author Bio here 11 (indicating)? 12 Q. Okay. 13 --- 14 (Whereupon, Exhibit Vigilante-10 was 15 marked for identification.) 16 --- 17 BY MR. HEINOLD: 18 Q. What's the next one? 19 A. The next one is from a website 20 called Motorbike Writer. It's another website 21 for motorcyclists. 22 Q. And what's the significance of 23 that? 24 A. He just kind of gives a</p>
<p style="text-align: right;">Page 254</p> <p>1 You know, before I involved in his case I knew 2 my vehicle was air-cooled, but I assumed and 3 believed that the purpose of the oil was to 4 lubricate and to cool the engine. And that's 5 what he was stating -- that's what the author 6 is stating in this paper, that an air-cooled 7 engine is actually an air/oil cooler. 8 And he also says that's why 9 mini bikes have external oil coolers and that 10 some of them have deep sump or additional 11 capacity oiling systems to prevent them from 12 overheating. 13 Then he makes a statement that 14 if that an engine is well-designed and factory 15 stock and in good running order, usually will 16 not overheat. And then he says: However, if 17 the engine was not well-designed or it's been 18 modified to produce additional power, or is 19 not in good tune, running lean, for instance, 20 is more vulnerable to overheating to 21 heat-related damage. 22 Q. Anything else significant about 23 that? 24 A. He also says that if you leave</p>	<p style="text-align: right;">Page 256</p> <p>1 description of how people who have a tendency 2 to let their bike idle for a while and rev it 3 up to warm it up. And he states that 4 consistent with BMW that it's not good for the 5 engine. 6 He says that older motorcycles 7 with carburetors and gluggy oils require a 8 long period of warming up, but today's fuel 9 injected engines with moderate sympathetic 10 oils can go straight after you push the 11 button. So he's just kind of giving an idea 12 of different motorcycles of different age, 13 different engine styles, some require longer 14 warm-up periods than others. 15 Q. So these are -- the last 16 several Exhibits are general background 17 information, not something on what you 18 specifically rely for an opinion? 19 A. Yes, just general background 20 information. 21 Q. Is this part of the same 22 article or is that a separate one? 23 A. I think that -- nope, you're 24 right. That's a different article.</p>

<p style="text-align: right;">Page 257</p> <p>1 MR. HEINOLD: We'll call that 2 Exhibit 11. 3 --- 4 (Whereupon, Exhibit Vigilante-11 was 5 marked for identification.) 6 --- 7 BY MR. VIGILANTE: 8 Q. Explain what Exhibit 11 is, 9 please. 10 A. Another website. This one is 11 revzilla.com. Revzilla is a large distributor 12 of aftermarket parts and motorcycle riding 13 accessories. And they're just giving their 14 understanding of the difference between 15 air-cooled and liquid-cooled. And they note 16 that they believe an air-cooled engine 17 operates in a water range of temperatures that 18 are considered normal. That's the other only 19 thing in there that I found interesting. 20 Q. Okay. Then we have a series of 21 photographs. Tell me what those are. Let's 22 break them down by vehicle if we can. 23 A. Yes, there's two sets then. 24 Well, actually, there's four sets. There's</p>	<p style="text-align: right;">Page 259</p> <p>1 bike manufacturer that put a warning on the 2 gas tank and then another warning on the 3 windshield. So just an example of a motorcyle 4 manufacturer putting warnings directly on the 5 bike itself. 6 Q. Those are actually the same 7 warnings as the prior photograph of Exhibit; 8 correct? 9 A. It's the same, same one? 10 Q. Same bike or -- 11 A. Same bike. 12 Q. I was looking for the other 13 Exhibit. Exhibit 6, is that the same -- it's 14 not the same bike? 15 A. Vigilante-12 is different than 16 Vigilante-6. 17 Q. Okay. But the warning is the 18 same. Is this the one I read from earlier? 19 A. Yes. 20 Q. We just didn't mark it? 21 A. Yes. There's two other 22 pictures in here and they just depict the 23 location of the oil sight glass, the right 24 side of the bike. And in the pictures you can</p>
<p style="text-align: right;">Page 258</p> <p>1 four pages of a blue Yamaha motorcycle. 2 Q. Okay. 3 MR. HEINOLD: We'll call that 4 Exhibit 12. 5 --- 6 (Whereupon, Exhibit Vigilante-12 was 7 marked for identification.) 8 --- 9 BY MR. HEINOLD: 10 Q. Is there a model or year 11 designated? 12 A. Yes. 13 Q. What is it? 14 A. It's a 1998 Yamaha YZF R1. 15 It's 1,000 CC motor. 16 MR. HEINOLD: I'm just going to 17 put a 1 on here because it didn't make it 18 through the copy on the Exhibit. 19 MR. LEVINE: Okay, sure. 20 BY MR. HEINOLD: 21 Q. Okay. What's the significance 22 of it? 23 A. Well, I took the pictures 24 because A, they're -- you know, it's a sports</p>	<p style="text-align: right;">Page 260</p> <p>1 see that when the bike is on its center 2 kickstand, which is -- you can see the oil 3 halfway up the oil sight glass. 4 Q. Which picture is that? 5 A. Let me pick it up for you. 6 There it is. 7 Q. I have a four-page Exhibit. 8 It's the last page? 9 A. The bottom one on the last 10 page. 11 Q. Is this upside down? 12 A. No. 13 Q. Are you looking at it correctly 14 or am I looking at it correctly? 15 A. This is the orientation of the 16 bike (indicating). 17 Q. Yeah, okay. 18 A. So the oil level is this dark 19 liquid here (indicating). So the top picture 20 and then the picture on the preceding page is 21 the bike on the left kickstand. You'll see 22 the oil is not in the oil sight glass. The 23 oil is on the left side of the engine. 24 Q. Okay. And we have some more</p>

<p style="text-align: right;">Page 261</p> <p>1 pictures?</p> <p>2 A. Yes, the next two pages are a</p> <p>3 BMW F800 GS 2010.</p> <p>4 Q. What's the significance of</p> <p>5 this?</p> <p>6 A. That's a 2010 BMW sport bike</p> <p>7 and they're using a dipstick on the left side</p> <p>8 of the crane case that's depicted in the top</p> <p>9 photograph.</p> <p>10 Q. Okay.</p> <p>11 ---</p> <p>12 (Whereupon, Exhibit Vigilante-13 was</p> <p>13 marked for identification.)</p> <p>14 ---</p> <p>15 BY MR. HEINOLD:</p> <p>16 Q. Then there's a one-page</p> <p>17 article?</p> <p>18 A. Yes, that is just stating that</p> <p>19 IIHS has categorized BMW R 1150 and the Yamaha</p> <p>20 YZF R1 as essential sport bikes or super sport</p> <p>21 bikes. The only reason I pulled that is just</p> <p>22 to show they're in the same classification as</p> <p>23 opposed to a cruiser type bike.</p> <p>24 Q. I'm not going to bother marking</p>	<p style="text-align: right;">Page 263</p> <p>1 BY MR. HEINOLD:</p> <p>2 Q. Now, the last area I want to</p> <p>3 cover is your comments and report on Mr.</p> <p>4 Breen's report. You had some criticisms of</p> <p>5 his report and his conclusions and</p> <p>6 inaccuracies.</p> <p>7 If it's all right with you, I'd</p> <p>8 like you just to take me through it, point out</p> <p>9 what they are and explain what it is.</p> <p>10 Would that be satisfactory for</p> <p>11 me to understand that?</p> <p>12 A. I can try.</p> <p>13 Q. Okay. If I have a follow-up</p> <p>14 I'll ask it.</p> <p>15 A. Let's go, the bottom of Page 3,</p> <p>16 he notes that when Yazdani purchased the</p> <p>17 motorcycle it was a used unit, he received and</p> <p>18 read this manual. And one of the things I was</p> <p>19 thinking is that I don't know that anyone ever</p> <p>20 established that Yazdani was given the</p> <p>21 R 1150 R, R850 Manual.</p> <p>22 In the deposition, his</p> <p>23 deposition they talk about it in generalities</p> <p>24 and then show him the manual, but I don't</p>
<p style="text-align: right;">Page 262</p> <p>1 that one, unless you --</p> <p>2 MR. LEVINE: No.</p> <p>3 BY MR. HEINOLD:</p> <p>4 Q. Then the last photos?</p> <p>5 A. The last photos are three</p> <p>6 different bikes, but they're all the BMW</p> <p>7 R 1100 RSL. So I believe this was the model</p> <p>8 bike that was involved in the NHTSA recall.</p> <p>9 ---</p> <p>10 (Whereupon, Exhibit Vigilante-14 was</p> <p>11 marked for identification.)</p> <p>12 ---</p> <p>13 BY MR. HEINOLD:</p> <p>14 Q. And that's it for the</p> <p>15 materials, right?</p> <p>16 A. Yes, you took the other Exhibit</p> <p>17 photos I had and marked those as Vigilante-6.</p> <p>18 Q. You need those back.</p> <p>19 MR. HEINOLD: Ken, can you make</p> <p>20 a copy of this Exhibit?</p> <p>21 MR. LEVINE: Yes.</p> <p>22 MR. HEINOLD: Whenever you get</p> <p>23 a chance.</p> <p>24 MR. LEVINE: Okay.</p>	<p style="text-align: right;">Page 264</p> <p>1 think they ever validated that's the manual</p> <p>2 all he received. And I did have a question</p> <p>3 about that so I marked that.</p> <p>4 On Page 4, second paragraph,</p> <p>5 Mr. Breen states that motorcyclists tend to be</p> <p>6 enthusiasts and into the sport of motorcycling</p> <p>7 and knowledgeable about the features of their</p> <p>8 motorcycles as well as competitor models. And</p> <p>9 he offers no proof to that statement, and it's</p> <p>10 generalized statement without any proof or</p> <p>11 insight into how much information people</p> <p>12 have.</p> <p>13 At the end of that paragraph he</p> <p>14 states: All of these activities tend to make</p> <p>15 motorcyclists more aware of their riding</p> <p>16 environment and the nature of their motorcycle</p> <p>17 compared to many average owners of passenger</p> <p>18 vehicles. And again, I noticed that's pure</p> <p>19 speculation and generalization. No proof to</p> <p>20 support that.</p> <p>21 Q. Okay. For the record, you're</p> <p>22 against pure speculation, generalization and</p> <p>23 no proof?</p> <p>24 A. Sure, I try to provide support</p>

<p style="text-align: right;">Page 265</p> <p>1 for all my opinions. 2 Q. Okay, I just want to be sure. 3 What's next? 4 A. The next paragraph he states: 5 On-product labeling has significant 6 substantial to deteriorate. 7 And although that is possible 8 for poorly designed warnings, certainly many 9 warnings on vehicles are designed to be a 10 hardy and stand up to the elements as the 1998 11 Yamaha YZF photos I produced show. 12 He also states: There is a 13 limited space available on motorcycles to 14 provide label. 15 And again, that's a half true 16 statement. That certainly a motorcycle is not 17 a tractor trailer with 53 feet of real estate, 18 there's still significant space to add a 19 label, depending upon the issue and where it's 20 applicable. Then I also note that contrary to 21 his two points, BMW North America added an 22 on-product warning to deal with their recall 23 defect. 24 Page 6, top of the</p>	<p style="text-align: right;">Page 267</p> <p>1 potential for overheating, fire if motorcycle 2 is allowed to run for prolonged periods in a 3 clear and concise manner. This approach is 4 consistent with the strategy to communicate 5 similar information utilized by other 6 motorcycle manufacturers, air-cooled engine 7 vehicles, including Suzuki, Harley-Davidson 8 and Yamaha. This approach is appropriate and 9 consistent within the motorcycle industry and 10 is safe and appropriate. 11 And I note that Yamaha and 12 Harley-Davidson do not require that you ride 13 away immediately. So their approach -- BMW's 14 approach is not consistent with Yamaha and 15 Harley-Davidson as he states. 16 Q. How about Suzuki? 17 A. I don't know that I looked up 18 the Suzuki manual. 19 Q. Go ahead. 20 A. In the third paragraph he 21 states: Yazdani reportedly started his engine 22 in the high idle choke position and then left 23 the engine riding for approximately 30 24 minutes.</p>
<p style="text-align: right;">Page 266</p> <p>1 paragraph -- 2 Q. Do you recall what Mr. 3 Yeldham's explanation for that was? 4 A. Explanation for what? 5 Q. Adding the on-product warning 6 to the motorcycle itself? 7 A. Yes, it was to inform people of 8 the potential fire hazard. 9 Q. Okay. What's next? 10 A. I'm sorry? 11 Q. That's what you recall? 12 A. That's what he testified. I 13 was going to go to the page. He testified on 14 Page 171: BMW AG decided to send out, put on 15 label, on the bike itself to reduce the risk 16 of fire occurring in bikes already on market. 17 175: They added label because 18 there was a risk of fire and they wanted to 19 make the end user aware of the risk. 20 Back to the report? 21 Q. Yes. 22 A. Page 6, top of Page 6 he 23 states: The approach of -- the information 24 provided in the manual addresses the issue of</p>	<p style="text-align: right;">Page 268</p> <p>1 This is two points. One is it 2 was required to start it in the high idle 3 choke position. And two, he forgot to add 4 that the idle had to go down to detent, 5 because to keep it in high you have to keep 6 pressure on the choke switch, and when you 7 release it it goes to detent. So it wasn't 8 left in high idle. He kind of missed that 9 point. 10 He says: Leaving it go for 30 11 minutes is well beyond a reasonable or normal 12 warm-up period. But he misses the point that 13 it's foreseeable. 14 He say: The engine is not 15 intended to be warmed up or operated in this 16 manner. So he misses the point again that it 17 is foreseeable to BMW. 18 And he also says that: The 19 engine will build up heat if left on full 20 choke position for an extended period of 21 time. Again, apparently doesn't realize that 22 the choke switch had to move down to detent 23 and not full choke after he released the choke 24 button.</p>

<p style="text-align: right;">Page 269</p> <p>1 MR. LEVINE: You keep using the 2 term detent. 3 THE WITNESS: Yeah, there's 4 a -- 5 MR. LEVINE: I just want you to 6 spell it. 7 THE WITNESS: Oh, I'm sorry, 8 D-E-T-E-N-T. 9 MR. LEVINE: Thank you. 10 THE WITNESS: So he says at the 11 bottom of that section: The subject incident 12 was solely related to a situation in which 13 Yazdani did not follow his standard practice 14 and became mentally distracted. 15 And I put the comment in 16 there: So it's okay for BMW to let his house 17 burn down and possibly kill or hurt someone 18 because he got distracted rather than fix the 19 design for him. 20 Next section, he says: That 21 sight glass is easier to use. And my question 22 is, Says who? Dipsticks have been used for 23 decades. And then I've never seen any 24 research to suggest the sight glass is easier,</p>	<p style="text-align: right;">Page 271</p> <p>1 risk of sitting in traffic for that long. 2 BY MR. HEINOLD: 3 Q. Where was this? What 4 paragraph? 5 A. That's the second from the 6 bottom (indicating). 7 Q. Okay. 8 A. Next paragraph he says: The 9 police fan kit is specifically designed for 10 motorcycles that will be used in a manner in 11 which they may be sitting idle for extended 12 periods of time to run equipment and/or 13 maneuvering at general low speeds. And it's 14 especially useful to riders such as patrol 15 officers who may be riding at slow speeds for 16 extended periods of time. 17 And again, my point is riding 18 at low speeds for extended periods of time is 19 foreseeable, and obviously BMW knew it was 20 foreseeable because they provided an option 21 for some of their bikes. 22 Top of Page 7: An air-cooled 23 engine -- 24 Q. Can I just stop you and ask you</p>
<p style="text-align: right;">Page 270</p> <p>1 and I never saw any research that said why 2 they needed to change to sight glass if it 3 introduces a new risk. 4 He says: Air-cooled engines 5 and motorcycles have a long history of 6 successful and acceptable use. And I comment 7 that my air-cooled Harley-Davidsons with 8 dipsticks can be left idling for 30 minutes 9 without spraying hot oil into the environment 10 and causing a fire. And that to me would be a 11 good reason why air-cooled engines have 12 been -- have a long history of success in 13 acceptable use as opposed to the design of 14 this BMW engine. 15 Later on in that paragraph he 16 says: The general concept is that when the 17 engine on the motorcycle is running, the 18 vehicle is moving, except during short periods 19 during warm-up or in traffic. He does not 20 define short. 21 And I got to tell Mr. Breen 22 that I sat in traffic jams longer than 30 23 minutes, and prior to this case I never 24 thought that a potential fire was a potential</p>	<p style="text-align: right;">Page 272</p> <p>1 this question: You don't -- do you intend to 2 offer an opinion about the efficiency of the 3 police van kit? 4 A. No, I'm going to leave that to 5 Mike Zazula. 6 Q. Okay. Then I won't ask you 7 about that. 8 A. Top of Page 7 he states: An 9 air-cooled engine on a motorcycle is widely 10 accepted and is not an unsafe or unreasonable 11 design configuration. My question is then 12 what makes the BMW different that a fire -- 13 the oil sight glass can fail causing fire. 14 Next paragraph he says: The 15 system utilized by BMW is consistent with that 16 of the motorcycle industry and safe for the 17 intended purposes. And I note that it's not 18 even consistent with BMW's own practices 19 regarding the hazard. 20 Q. That being the -- 21 A. The warnings. 22 Q. -- the choke that you talked 23 about? 24 A. The warning, the warning in the</p>

<p style="text-align: right;">Page 273</p> <p>1 manual. 2 Q. You're saying it's not 3 consistent with -- 4 A. BMW's practice regarding 5 similar hazard. 6 Q. I don't know what you mean by 7 its own practice regarding similar hazard. 8 Can you explain that? 9 A. Sure. I apologize, the start 10 of that paragraph goes into my report -- my 11 report is primarily focused on allegations 12 that the product information or warnings 13 provided by BMW were inadequate and were the 14 cause of this incident. And he's saying that 15 this system utilized by BMW is consistent with 16 that of motorcycle industry and safe for the 17 intended purposes. 18 And I'm saying it's not even 19 consistent with BMW North America's practice 20 regarding the similar type hazard. And, of 21 course, that's the recall and their decision 22 to place a warning on the bike regarding the 23 fire risk of leaving it sit stationary. 24 Q. Okay.</p>	<p style="text-align: right;">Page 275</p> <p>1 A. Warning Related Information. 2 The second to the last sentence he says: 3 There is always a significant question as to 4 if any individual follow or heed any specific 5 warning, sign or label. And we talked about 6 this earlier in the deposition, and I note in 7 his report that is why you eliminate by design 8 or guard as preferred, particularly over a 9 warning buried in a manual. 10 The next paragraph he says: 11 The common practice in the motorcycle 12 industry, et cetera. And I note, again, he's 13 failing to note that it's not consistent with 14 BMW North America's own practice regarding a 15 similar hazard risk. 16 The next paragraph, the end of 17 the paragraph he states: In terms of risk 18 hierarchy an attempt to provide this 19 information in the form of on-product label 20 would not be appropriate. And I simply 21 state: No, he is not following the safety 22 hierarchy. If he was, he would recognize that 23 eliminating the risk for alternative design, 24 providing a guard and then an on-product</p>
<p style="text-align: right;">Page 274</p> <p>1 A. The next paragraph he gets into 2 risk prioritization, and the risks that are 3 the most significant in terms of frequency 4 and/or severity should be given priority. I 5 agree with that. 6 However, what he forgets and 7 doesn't deal with is that what also works its 8 way into prioritization is the expected 9 knowledge of the user and whether or not the 10 hazard is created by something that is 11 atypical or unique of that product as opposed 12 to the rest of the industry. 13 And in here we have a case 14 where you have the potential for severe injury 15 or death or property damage, which is the 16 highest severity you can get. And you have 17 everyone that gets on this is potentially 18 exposed, and you have a very low expected 19 knowledge, and it's not consistent with 20 features of other bikes that don't get catch 21 fire if allowed to sit and idle for 15, 20, 30 22 minutes. 23 Q. Tell me what the next paragraph 24 begins with.</p>	<p style="text-align: right;">Page 276</p> <p>1 warning would be the appropriate way in which 2 to follow the risk hierarchy. 3 Q. The safety hierarchy being -- 4 A. Design. 5 Q. Design, guard, warn? 6 A. Yes. 7 Q. Okay. 8 A. The next paragraph is where he 9 really comes off the boat. He says that: The 10 risk of a fire due to the motorcycle being 11 allowed to run without moving for prolonged 12 periods is relatively low and has a relatively 13 low severity. And it's the last part that I 14 take exception with. Potentially killing 15 somebody, burning down their house is the 16 highest severity you can give to a hazard. 17 How he can say it's relatively low is 18 completely beyond me. 19 Q. Okay. You're not aware of any 20 personal injury, are you? 21 A. Related to the oil sight glass 22 failing? 23 Q. Yes. 24 A. No, but the potential is there.</p>

<p style="text-align: right;">Page 277</p> <p>1 Q. You're talking there simply 2 about potential? 3 A. When you do your risk analysis 4 you're basing it upon potential. It's 5 inappropriate to wait and get the product in 6 the field and possibly kill somebody before 7 you decide whether or not it's a hazard you 8 should have dealt with through design. 9 Q. Are there other risks with 10 regard to operating a motorcycle, a higher 11 risk potential? 12 A. Well, there's more chance that 13 you can hurt yourself if you're going at a 14 high speed, but it's a different issue and a 15 different topic that what we're dealing with 16 here. 17 Q. Well, I understand that, but if 18 you're looking at the comparison of the 19 various risks that come with being a 20 motorcycle owner -- 21 A. Well, here's the comparison, 22 because I was getting to that in the end of 23 that paragraph, the other risk associated with 24 letting it run idle is overheating.</p>	<p style="text-align: right;">Page 279</p> <p>1 are two different issues and they need to be 2 looked at separately. 3 And the knowledge of motorcycle 4 riders or owners of this product need to 5 consider their knowledge with respect to the 6 potential for the glass to fail and the fire 7 to occur, not whether it's going to overheat 8 or not. 9 The next page after the 10 pictures he says that: In addition, the 11 Service Bulletin can include a label to be 12 affixed to the front portion of the motorcycle 13 regarding the potential for overheating and/or 14 fire. And he's calling the recall Service 15 Bulletin. He says: An on-product advisory 16 label is not appropriate as this represents a 17 change in the information -- I'm sorry, it 18 says: An on-product advisory label -- 19 MR. LEVINE: She's trying to 20 understand. Try to keep her in mind while 21 you're answering the question. 22 THE WITNESS: Okay. He says: 23 An on-product advisory label is not 24 inappropriate as this represents a change in</p>
<p style="text-align: right;">Page 278</p> <p>1 Overheating can cause problems to the 2 mechanical functioning of the bike, but it's 3 not going to burn your house down. So that 4 would be a less severe risk. Burning your 5 house down and potentially killing the 6 occupants of it is a very severe, most severe 7 hazard. 8 So another point I wanted to 9 make with that is he says: That enthusiast 10 level motorcycle riders, and I don't know how 11 he defines enthusiast level, or whether 12 Yazdani was an enthusiast level, but 13 apparently they understand that an air-cooled 14 engine needs air flow to cool. When attended 15 there are other warnings to riders that the 16 motorcycle engine is overheating. These 17 warnings include radiating heat and 18 understanding the engine runs heat will 19 develop. And these are the warnings that he's 20 talking about, alert the rider to the fact 21 that the engine may overheat. It doesn't 22 alert them to the fact that the oil sight 23 glass is going to fail, allow hot oil to 24 escape and ignite and cause a fire. So there</p>	<p style="text-align: right;">Page 280</p> <p>1 the information provided to users for this 2 specific model. The Service Campaign was 3 based on a limited number of incidents and no 4 reported injuries. And I note it's the same 5 type of hazard. It's the same issue. The 6 rider is not aware of the risk of not riding 7 away immediately. 8 And the argument for why it's 9 okay for the Service Bulletin/Recall to 10 include the label is completely contrary to 11 the same argument he just made on Page 7 as to 12 why it wasn't needed. That is, low risk, no 13 injury and people should know. 14 So if there's low risk, no 15 injury, people should know, and that's why 16 it's not needed, as he argues on Page 7, how 17 does he argue that a low risk, no injury, 18 people should know, Page 8, it's okay to have 19 it an on-product warning. To me they appear 20 to be completely conflicting opinions. 21 Q. Weren't there two different 22 issues involved with the motorcycle? He's 23 talking about with the on-product label in the 24 Service Campaign versus Mr. Yazdani's</p>

<p style="text-align: right;">Page 281</p> <p>1 motorcycle?</p> <p>2 A. The Recall Campaign was for a</p> <p>3 fire hazard associated with letting the bike</p> <p>4 sit at idle, stationary for an extended period</p> <p>5 of time.</p> <p>6 Q. And what was the specific</p> <p>7 hazard that was recognized?</p> <p>8 A. It was a fire hazard. That was</p> <p>9 the hazard.</p> <p>10 Q. That's very general. That</p> <p>11 wasn't my question. What was the specific</p> <p>12 issue that was going to cause the fire?</p> <p>13 A. The fire was going to be caused</p> <p>14 by letting the bike sit idle for an extended</p> <p>15 period of time having the exhaust eat up and</p> <p>16 potentially igniting the fairing. Regardless</p> <p>17 of the underlying mechanism of the fire, the</p> <p>18 risk is still the same. If you let the bike</p> <p>19 sit at a standstill for a prolonged period of</p> <p>20 time you get a fire. It's the same hazard,</p> <p>21 fire hazard.</p> <p>22 Q. On Mr. Yazdani's bike what is</p> <p>23 the risk of catching the lower fairings on</p> <p>24 fire?</p>	<p style="text-align: right;">Page 283</p> <p>1 to eliminate hazards through design to provide</p> <p>2 safeguards so you don't have to rely upon the</p> <p>3 weakest link in the chain, that is the human</p> <p>4 and all their frailty.</p> <p>5 Two, warnings are used to</p> <p>6 overcome distraction. Most typically audible</p> <p>7 warnings are used to grab a person's attention</p> <p>8 who's attention is focused elsewhere. That's</p> <p>9 the whole intent and purpose of the warning.</p> <p>10 Q. Is an audible warning practical</p> <p>11 in this circumstance?</p> <p>12 A. I didn't assess whether or not</p> <p>13 it was practical. Is it possible, I think</p> <p>14 that if you give me a second there was an</p> <p>15 expert in the Amsdale vs. BMW North America</p> <p>16 that opined that they could have provided an</p> <p>17 indicator light on the master -- excuse me,</p> <p>18 the -- it says, I'll read it. I'm a little</p> <p>19 bit tied up with my words at the moment, I</p> <p>20 apologize: The model R 1150 GS has a</p> <p>21 well-designed warning panel with lights</p> <p>22 including a master warning light and an oil</p> <p>23 temperature gauge. However, there was no</p> <p>24 reference on the panel to as what the oil</p>
<p style="text-align: right;">Page 282</p> <p>1 A. There is no lower fairing.</p> <p>2 Q. The risk would be --</p> <p>3 A. The risk would be the oil sight</p> <p>4 glass failing.</p> <p>5 Q. The risk of that would be zero;</p> <p>6 correct?</p> <p>7 A. The risk of the fairing</p> <p>8 catching on fire would be zero, but the</p> <p>9 hazards --</p> <p>10 Q. So that risk is different than</p> <p>11 the risk of the oil sight glass failure;</p> <p>12 correct?</p> <p>13 A. It's the same hazard and the</p> <p>14 same behavior of the operator that's</p> <p>15 associated with the hazard. The ignition</p> <p>16 scenario may differ, but it's the same</p> <p>17 result. You have a fire to an unattended or</p> <p>18 maybe even it's an attended motorcycle that's</p> <p>19 allowed to sit at a standstill.</p> <p>20 He states in the next</p> <p>21 paragraph: A warning was never intended nor</p> <p>22 can warning address issues related to</p> <p>23 distraction. Two points there. Number one,</p> <p>24 the potential for distraction is why you want</p>	<p style="text-align: right;">Page 284</p> <p>1 temperature reading should be to indicate to a</p> <p>2 rider that his or her engine is up to a safe,</p> <p>3 operating temperature and he or she should</p> <p>4 turn off the choke and drive away.</p> <p>5 Q. Does that have any relevance in</p> <p>6 Mr. Yazdani's situation?</p> <p>7 A. Well, it -- the reason I</p> <p>8 brought it up was that you said it would be</p> <p>9 impractical or not feasible to put an audible</p> <p>10 indicator in this case.</p> <p>11 Q. No. I asked if it was.</p> <p>12 A. And my response was that</p> <p>13 apparently there's another expert that felt it</p> <p>14 was possible to include an indicator light to</p> <p>15 monitor the heat of the engine. If you can</p> <p>16 put an indicator light to monitor the heat of</p> <p>17 the engine, you can put an audible indicator</p> <p>18 in conjunction with it. That was the point I</p> <p>19 was trying to make.</p> <p>20 Q. Are you advocating that here?</p> <p>21 A. No, I'm not, but you asked.</p> <p>22 Q. Okay.</p> <p>23 A. And I was also pointing out the</p> <p>24 fact that his statement that warning was never</p>

<p style="text-align: right;">Page 285</p> <p>1 intended or can warning address issues related 2 to distraction is just plain wrong. 3 Q. Well, the way we got on this 4 audible warning is because you said it's wrong 5 because you could put an audible warning on 6 there and we do it all the time. And then I 7 said, Are you advocating that? And then you 8 went to the other expert. So you brought up 9 the audible warning. 10 And now I'm asking you: Are 11 you advocating that? 12 A. If it's feasible, absolutely. 13 Q. Are you advocating that in this 14 case? It's not in your report. 15 A. I'm not aware of anybody 16 advocating the audible warning. The point I'm 17 making is that he made an incorrect statement, 18 he made a false statement, and I was pointing 19 out why it was false, why warnings are used to 20 capture the attention of people who may 21 otherwise be distracted. 22 I pointed out that another 23 expert thought you could put an indicator 24 light onto this bike to alert people to an</p>	<p style="text-align: right;">Page 287</p> <p>1 risks, unnecessary risks to the product. That 2 means it is not reasonable. 3 Finding 3, he says: The manner 4 in which BMW provided information is 5 consistent with that in the motorcycle 6 industry. I just point out that it's not 7 consistent with BMW North America's own action 8 regarding a similar issue. 9 Number 4: There's no need to 10 provide an on-product warning label that 11 indicates that the engine if run without 12 moving for a prolonged period of time, that 13 the engine can overheat and may result in a 14 fire. Potential for engine overheating is 15 common knowledge. My point is that it's not 16 common knowledge that the oil sight glass is 17 going to fail and cause a fire. 18 Number 5, he says: That is not 19 the situation that would have been prevented 20 with an on-product label. And I counter the 21 fire occurred because Yazdani didn't know that 22 leaving the bike idle stationary could cause 23 the oil sight glass to fail and cause a fire. 24 Had they provided an adequate warning on the</p>
<p style="text-align: right;">Page 286</p> <p>1 overheat condition. And if you can put the 2 indicator light on, you can put an audible 3 warning on it. 4 At the end of that paragraph he 5 says: This would not have impacted him 6 because -- this would not have impacted him 7 becoming distracted. 8 And my comment was he misses 9 the point, it has nothing to do with him being 10 distracted, because it would have prevented 11 him from starting it and letting it idle in 12 the first place. 13 His findings, Finding Number 2, 14 he states: Configuration of the motorcycle, 15 including the air-cooled engine and oil sight 16 glass is an appropriate design and does not 17 pose an unreasonable risk. And I say that's 18 false. It's a design that introduced a risk 19 that doesn't exist with the dipstick, 20 including the dipstick on my Harley-Davidson 21 that won't fail and spray hot oil from the 22 engine and cause a fire. 23 So you've introduced a feature 24 that may have some benefits, but it introduced</p>	<p style="text-align: right;">Page 288</p> <p>1 bike he would have been alerted to it, 2 informed of it and complied with it. 3 Q. Are you aware of any advantages 4 that the sight glass, oil sight glass might 5 have over a dipstick? 6 A. I think that it's provided so 7 that you get a reading without having to 8 remove the dipstick, and potentially to get 9 oil dripping on the surface of the bike. 10 Q. Anything else? 11 A. I think that's the only thing I 12 recall being mentioned. 13 Q. So you're relying on what he 14 said rather than your independent knowledge of 15 the design of a motorcycle for that; correct? 16 A. Yes, I didn't see a real 17 benefit of it other than you don't have to 18 pull the dipstick out. But then, again, I 19 check my oil sitting on my bike. To do it 20 with an oil sight glass I got to stop, get off 21 the bike and check the oil I don't really see 22 the benefit of it. If there's another 23 benefit, I'm not aware of it. 24 Q. What's the consequence of oil</p>

<p style="text-align: right;">Page 289</p> <p>1 dripping onto the engine? 2 A. Well, first of all, if it drips 3 on the engine it's probably just going to burn 4 off. But typically, the dipstick is in the 5 oil pan. On my Harleys they're on the right 6 side of it behind the engine. They may drip 7 on the chrome, but I can wipe it off. They 8 may drip on the exhaust, but I can wipe it 9 off. 10 Q. What if the exhaust is real 11 hot? 12 A. It's not that big of a deal. 13 Q. Any disadvantages of the use of 14 a dipstick? 15 A. Well, I think that's what they 16 said, the advantage was that you don't have to 17 worry about getting oil on things. I mean, 18 we're talking about a dipstick. We're not 19 talking about a fountain of oil coming out of 20 this thing. 21 Q. Anything else? 22 A. There shouldn't be a whole lot 23 of oil dripping off of it. Yeah, I'm not 24 aware of anything else offhand.</p>	<p style="text-align: right;">Page 291</p> <p>1 A. I don't know. I pointed to 2 that Yamaha YZF as an example of the 3 manufacturer putting it on the right side. 4 And again, the oil is checked when the bike is 5 upright, not leaning on its left side 6 kickstand. 7 Q. Are you intending to offer the 8 opinion in your discussions about this 9 motorcycle that the product is defective 10 because it uses an oil sight glass, or is that 11 going to be left to somebody else? 12 A. Yes. Again, it's my assumption 13 that the hazard is created by the use of the 14 oil sight glass and the makeup of the oil 15 sight glass, the material they chose. And I'm 16 relying upon Mark Yeldham for that testimony. 17 Q. But you're not -- 18 A. And Mike Zazula. 19 Q. But you're not going to offer 20 that opinion in terms of product defect, 21 whether it is or isn't defective without -- I 22 think we're clear, you're going to describe it 23 as a characteristic that has this potential 24 consequence and therefore --</p>
<p style="text-align: right;">Page 290</p> <p>1 Q. Any advantages or disadvantages 2 of having a sight glass on one side of the 3 engine or the other, and if so, what it's 4 depended on? 5 A. I'm not aware of the advantages 6 or disadvantages of having it on -- I'm not 7 aware of the advantages of having it on the 8 left side. It's my understanding the oil is 9 supposed to be checked with the bike on the 10 center stand, not the left side, so that the 11 engine is level. 12 So if you had it on the right 13 side, in the same position on the right side 14 as you could, and I'm not saying you could, 15 but if you had it on the right side and you 16 checked it on the center stand it shouldn't 17 make a difference. 18 If it's something unique to the 19 way they designed that engine, you know, it's 20 possible. I don't know offhand. I haven't 21 seen anybody explain from BMW why it's on the 22 left side, not the right side. 23 Q. But you don't have an 24 explanation one way the other?</p>	<p style="text-align: right;">Page 292</p> <p>1 A. I'm going to characterize it as 2 a defect that allows the risk, fire risk to 3 exist. 4 Q. Are you -- all right. Do you 5 consider any motorcycle that uses an oil sight 6 glass defective? 7 A. I don't, but I don't know of 8 any others that have this type of melting 9 point with it being placed on the left side of 10 the crank case and having the hot oil touch it 11 and being the reason why it's deformed. 12 Q. Do you know what the design of 13 the seal around any other oil sight glass is? 14 A. I do not. 15 Q. Is it your opinion that if an 16 oil sight glass is on the left side of the 17 engine that the motorcycle is defective 18 because of that? 19 A. Not necessarily because it's on 20 the left side of the engine, but if it's going 21 to be on the left side of the engine and 22 deformed when exposed to foreseeable 23 temperatures, that is a design defect. 24 Q. And you define foreseeable</p>

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1 temperatures as what?
2 A. Well, the report of fire is
3 anywhere from 10 minutes to 30 minutes.
4 Q. Anything else?
5 A. No.
6 Q. Have we fairly covered the
7 opinions that you're intending to express in
8 the trial of this case?
9 A. I don't -- I can't think of
10 anything that we missed.
11 Q. Okay. Have we fairly covered
12 the basis for your opinions?
13 A. I can't think of anything that
14 we missed.
15 MR. HEINOLD: Okay, we're done.
16 Thank you.
17 THE WITNESS: I would like to
18 read and sign.
19 ---
20 (Whereupon, the deposition was
21 concluded at 4:50 p.m.)
22 ---
23
24

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1 C E R T I F I C A T E
2 I, Debra J. Veneziale, a Court Reporter
3 and Notary Public, do hereby certify that the
4 proceedings, evidence, and objections upon the
5 deposition of WILLIAM J. VIGILANTE, JR., PhD,
6 CPE are contained fully and accurately in the
7 stenographic notes taken by me upon the
8 foregoing matter on March 15, 2016, and that
9 this is a true and correct transcript of the
10 same.
11
12
13 Debra J. Veneziale
14 Court Reporter
15 Notary Public
16 My Commission Expires
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20 transcript does not apply to any reproduction
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